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SUPREME COURT OF THE UNITED STATES.

No. ~~285.~~ 167.

JOHN McGUIRE, PLAINTIFF IN ERROR,

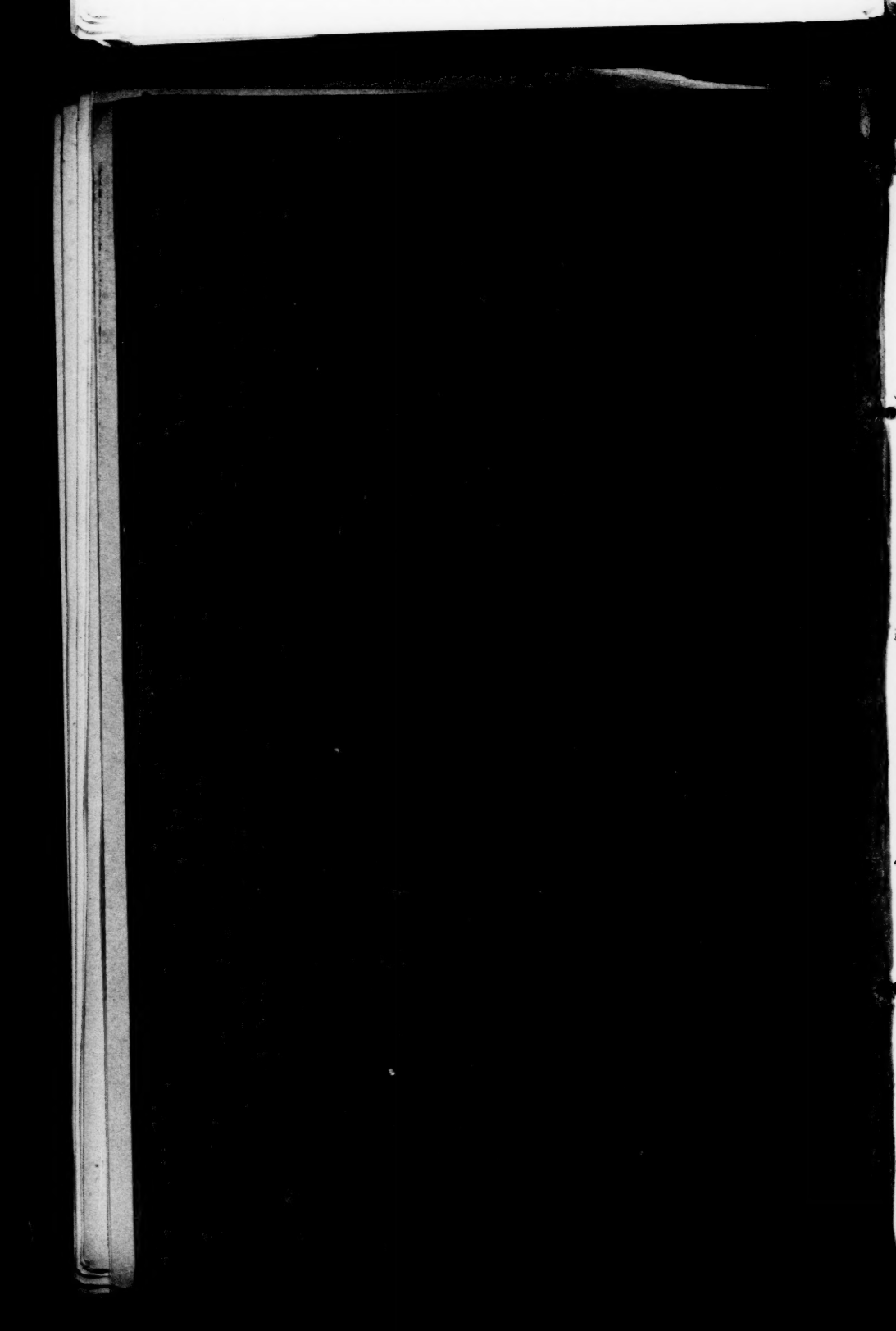
vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS.

GOVERNMENT PRINTING OFFICE.

18 How 241



SUPREME COURT OF THE UNITED STATES.

No. 265.

JOHN McGUIRE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the commonwealth of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the commonwealth of Massachusetts, plaintiff, and John McGuire, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of

2 a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John McGuire, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-three.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

NATHAN CLIFFORD,
Associate Justice Sup. Court U. S.

3 The United States of America to the commonwealth of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the superior court of the commonwealth of Massachusetts, wherein John McGuire is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S

4 On this fourth day of March, in the year of our Lord one thousand eight hundred and sixty-four, personally appeared Charles N. Rich-

ardson before me, the subscriber, a justice of the peace within and the county of Suffolk and commonwealth of Massachusetts, and makes oath that he delivered a true copy of the within citation to John A. Andrew, governor of the commonwealth of Massachusetts.

C. N. RICHARDSON.

Sworn to and subscribed the 4th day of March, A. D. 1864.

A. F. L. NORRIS,
Justice of the Peace.

On this twenty-sixth day of February, in the year of our Lord one thousand eight hundred and sixty-four, personally appeared Nathaniel Richardson before me, the subscriber, a justice of the peace within and for the county of Suffolk and commonwealth of Massachusetts, and makes oath that he delivered a true copy of the within citation to Dwight Foster, attorney general of the commonwealth of Massachusetts.

N. RICHARDSON.

Sworn to and subscribed the fourth day of March, A. D. 1864.

A. F. L. NORRIS,
Justice of the Peace.

5 Know all men by these presents that we, A. F. L. Norris and N. Richardson, of Boston, State of Massachusetts, are held and firmly bound unto the commonwealth of Massachusetts, in the full and just sum of five hundred dollars, to be paid to the said the commonwealth of Massachusetts, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of February, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas lately, at a superior court of the commonwealth of Massachusetts, in a suit depending in said court between the commonwealth of Massachusetts, plaintiff, and John McGuire, defendant, judgment was rendered against the said John McGuire, and the said John McGuire having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said the commonwealth of Massachusetts, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the said John McGuire shall prosecute his said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

A. F. L. NORRIS. [SEAL.]
N. RICHARDSON. [SEAL.]

Sealed and delivered in the presence of—
ROB'T H. BROOM.
THOS. S. MERCER.

6 Supreme Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

JOHN McGUIRE, plaintiff in error,
vs.
THE COMMONWEALTH OF MASSACHUSETTS, defendant.

On a judgment of the superior court for the transaction of criminal busi-

ness, begun and holden at Salem, within and for the county of Essex, in said commonwealth, on the fourth Monday of January, in the year of our Lord eighteen hundred and sixty-four, wherein the said commonwealth of Massachusetts is plaintiff, and the said John McGuire, of Salem, in the county of Essex and commonwealth aforesaid, is defendant. And the said John McGuire prays for a writ of error to issue returnable to the Supreme Court of the United States now in session at Washington, in the District of Columbia, within and for the United States, and assigns for errors in the record of the process and judgment aforesaid the following, to wit:

By the provisions of the General statutes of Massachusetts, chap. 87, sect. 7, it appears that by the laws of Massachusetts no party within the State can keep and maintain a place of business for the purpose of
7 selling intoxicating liquors, all of which appears by the record in this case, and that the court adjudged that no license to any party in the commonwealth of Massachusetts under the act of Congress, and especially the license in this case, would protect a party from punishment under and by virtue of the laws of the State; and that by the authority of the act of Congress, and a proper construction of an act to provide internal revenue to support the government and to pay interest on the public debt, approved July 1, 1862, and by authority of a license duly granted to said McGuire under said act, all of which appears by the record in this case, the said statute of the commonwealth of Massachusetts is void and of no effect, and the validity of said act of Congress is drawn in question; and the said ruling of said superior court is erroneous and should be reversed; and that by the said act of Congress and statute of the United States the said judgment is erroneous, because by said act of Congress and statute of the United States said McGuire, having paid for and received his said license under and by virtue of said act of Congress and statute of the
8 United States, had a legal right to do the acts complained of, as appears by the record hereto annexed. That the plaintiff at said January term of said superior court, in the year of our Lord one thousand eight hundred and sixty-four, was by the presiding judge of said superior court sentenced to pay a fine of one hundred dollars to the use of said commonwealth, and the costs of said prosecution, taxed at twenty-nine dollars and fourteen cents, as fully appears by the record hereto annexed. And whereas said judgment remains unsatisfied, the said John McGuire prays that a writ of supersedeas in due form of law may issue, properly directed, restraining the further execution of said judgment, sentence, and order of said court, until the matter of error herein set forth is heard and determined by this honorable court.

JOHN McGUIRE,
By his attorney, Nathaniel Richardson.

9 COMMONWEALTH OF MASSACHUSETTS, *Essex, to wit:*

At the superior court begun and holden at Newburyport, within and for said county of Essex, on the second Monday of May, in the year of our Lord one thousand eight hundred and sixty-three.

The jurors for the commonwealth of Massachusetts, upon their oath, present that John McGuire, of Salem, in said county of Essex, at Salem, in said county, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-two, and on divers other days and times between that day and the day of the finding of this indictment, did keep and maintain a certain tenement, there situate, then and there resorted to for illegal gaming, and then and there used by the said John McGuire for the illegal sale and illegal keeping of intoxicating *of intoxicating* liquors, to the great in-

jury and common nuisance of all the peaceable citizens of said commonwealth there being, inhabiting, passing, and repassing, against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

A true bill.

W. R. WHITTIER,
Forreman of the Grand Jury.
A. A. ABBOTT, *District Attorney.*

10 *Copy of exceptions.*

Superior court, May term, 1863.

COMMONWEALTH OF MASSACHUSETTS, *Essex, ss:*

COMMONWEALTH
vs.
JOHN MCGUIRE.

This was a prosecution under the provisions of Gen. Stat., ch. 87, sec. 7, for a nuisance. The indictment is made a part of the case.

Upon the trial there was no evidence of any illegal gaming in the tenement of defendant.

It was proved and admitted that defendant from the first day of September, A. D. 1862, up to the day of finding the indictment, kept and maintained a tenement as alleged in the indictment, used by him for the sale and keeping for sale of intoxicating liquors. These acts of sale and keeping were admitted to have been illegal and in violation of the law of this commonwealth, unless the defendant was authorized to keep and sell intoxicating —— by a license granted to him conformably to the provision of an act of Congress to provide internal revenue. The defendant produced his license in evidence, which is hereto annexed, marked A.

The court ruled that this license gave the defendant no right to sell intoxicating liquors in violation of the laws of Massachusetts.

The jury having found a verdict of guilty, and the defendant feeling aggrieved by the above ruling of the court, excepts thereto, which exception is hereby allowed.

E. WILKINSON, *Justice of Sup. Court.*

11 COPY A.

No. 346.—*License—granted September* 1, 1862; *expires September* 1, 1863.

To all whom it may concern:

This license is granted to McGuire & Co., of the city of Salem, in the county of Essex and State of Massachusetts, to carry on the business or occupation of wholesale dealer in liquors at No. 6 Derby square, in the aforementioned city, county, and State, having paid the tax of one hundred dollars therefor, conformably to the provisions of an act entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," approved July 1, 1862. Persons constituting is John McGuire alone.

This license to be in force until the first day of September, 1863, provided the said McGuire shall conform to the requirements of said act, and of such other act or acts as are now or may hereafter be in this behalf enacted.

Given under my hand and seal at Salem, this first day of September,
[L. S.] A. D. 1862.

J. VINCENT BROWNE,
Collector of the fifth collection district, in the State of Mass.

12 COMMONWEALTH OF MASSACHUSETTS, *Essex, ss:*

At the superior court begun and holden at Salem, for the transaction of criminal business, on the fourth Monday (being the twenty-fifth day) of January, in the year of our Lord one thousand eight hundred and sixty-four.

1265—JOHN MCGUIRE.

The jurors for the commonwealth of Massachusetts, upon their oath, present that John McGuire, of Salem, in the county of Essex at said Salem, on the first day of January, A. D. 1862, and on divers other days and times between that day and the day of the finding of this indictment, did keep and maintain a certain tenement there situate, then and there resorted to for illegal gaming, and then and there used by the said John McGuire for the illegal sale and illegal keeping of intoxicating liquors, to the great injury and common nuisance of all the peaceable citizens of said commonwealth there being, inhabiting, passing, and repassing, against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

This indictment was found at May term, 1863, when the said McGuire was set to the bar, and had this indictment read to him. He said that thereof he was not guilty, and for trial put himself on the county. A jury was thereupon empannelled and sworn to try the issue, viz: Augustus Fowler foreman, and fellows, viz: James G. Tewksbury, Isaac O. Barnard, Samuel Brown, jr., Ensign Chandler, Ralph Clark, Jason Clark, Benj. D. Dixie, Charles R. Titcomb, Daniel F. Fitts, William B. Gale, and Lemuel Haskell, who, after hearing all matters and things concerning the same, returned their verdict, and upon their oaths did say that said McGuire was guilty. Thereupon the defendant alleged exceptions, and the case was continued for the judgment of the supreme judicial court for the commonwealth thereon until this term. And now said exceptions are overruled by the said supreme judicial court, as by the rescript on file. It is therefore considered by the court that the said McGuire be punished by paying a fine of one hundred dollars to the use of the commonwealth, and the cost of this prosecution, taxed at twenty-nine dollars fourteen cents, and that he stand committed until said fine and costs are paid.

13 COMMONWEALTH OF MASSACHUSETTS, *Essex, ss:*

To all people to whom these presents shall come:

I, Asahel Huntington, clerk of the court aforesaid, do certify that the foregoing are true copies of indictment and bill of exceptions, as on file in said court, and a true copy of the proceedings of said case in the court aforesaid, and that said case is now pending in said court.

In testimony whereof, I hereunto set my hand and affix the seal
[SEAL.] of said court, at Salem, this twelfth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

ASAHEL HUNTINGTON, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Essex, ss:*

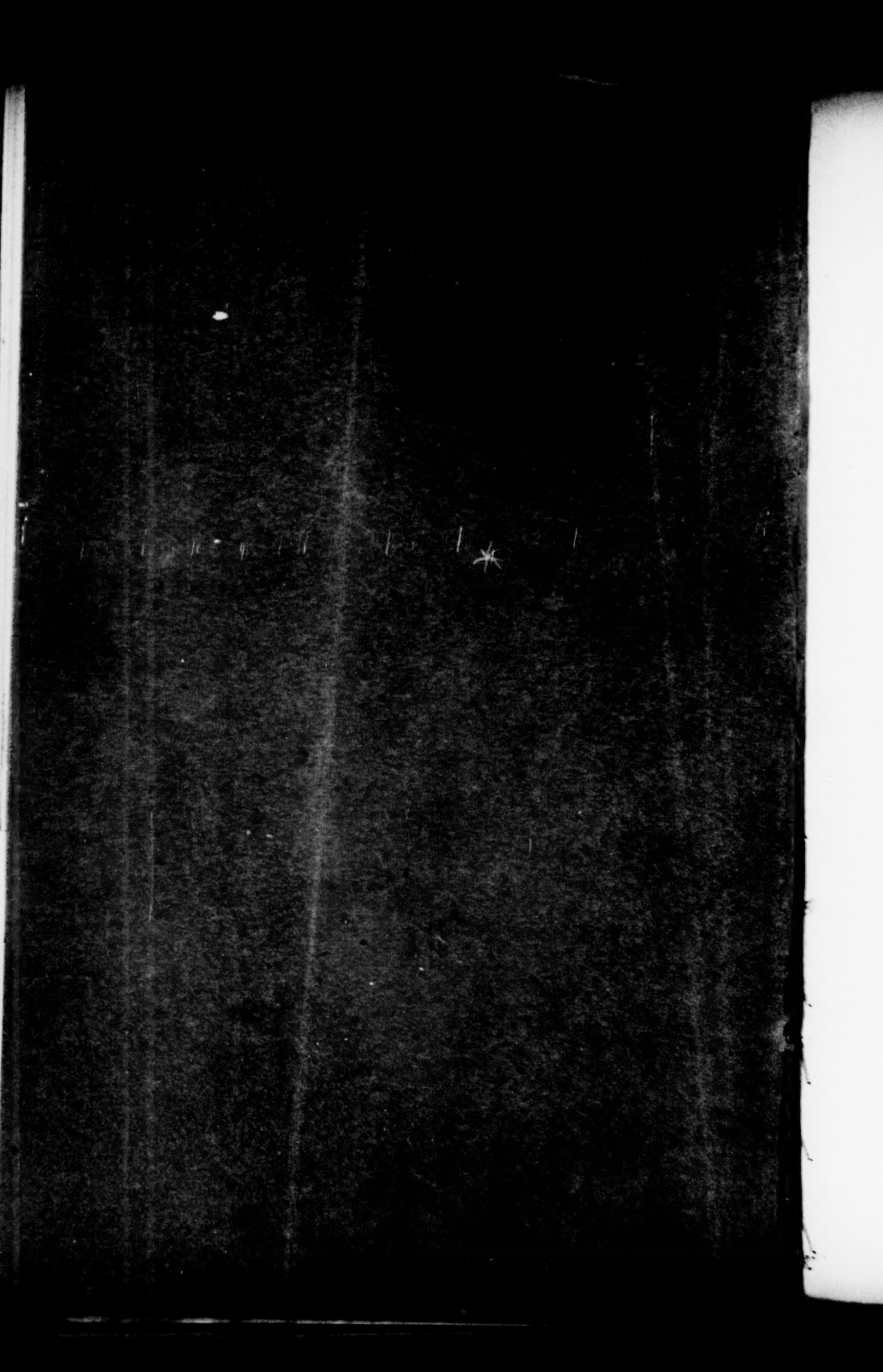
To all people to whom these presents shall come:

I, Otis P. Lord, presiding justice of the superior court for said county, do certify that Asahel Huntington is clerk of said court for the county of Essex, and that his attestation of the record and proceedings of said court above written is in due form.

In testimony whereof, I have hereunto set my hand and caused the [SEAL.] seal of said court to be hereunto affixed, this twelfth day of February, in the year of our Lord one thousand eight hundred and sixty-four.

OTIS P. LORD.

Filed October 4, 1864.



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Supreme Court of the United States.

No. 161, December Term, 1865.

JOHN McGUIRE, Plaintiff in Error,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is a writ of error addressed to the Superior Court of Massachusetts, under the 25th section of the judiciary act.

The case below was a prosecution under the provisions of the general statutes of Massachusetts, chapter 87, section 7, for a nuisance. The nuisance alleged was that of keeping and maintaining a tenement used for the sale and storage of intoxicating liquors.

The acts imputed as unlawful were proved and admitted by the defendant, unless he was authorized so to keep and sell, in virtue of a license granted to him by the United States, in conformity with the act of Congress to provide internal revenue for the United States. The license put in was in the following words:

No. 346.—*License granted September* 1, 1862; *expires September* 1, 1863.

To all whom it may concern:

This license is granted to McGuire & Co., of the city of Salem in the county of Essex and State of Massachusetts,

to carry on the business or occupation of wholesale dealer in liquors, at No. 6, Derby Square, in the aforementioned city, county, and State, having paid the tax of one hundred dollars therefor, conformably to the provisions of an act entitled "An act to provide internal revenue to support the Government, and to pay interest on the public debt," approved July 1, 1862.

Persons constituting is John McGuire alone.

This license to be in force until the first day of September, 1863, provided the said McGuire shall conform to the requirements of said act, and of such other act or acts as are now or may hereafter be in this behalf enacted.

Given under my hand and seal at Salem this first day of September, A. D. 1862.

[SEAL.] J. VINCENT BROWNE,
Collector Fifth Collection District, State of Mass.

Under instructions of the court this defense was overruled, and the defendant was thereupon convicted, and sentenced to pay a fine to the use of the Commonwealth.

CONSIDERATIONS OF LAW.

This case involves, as doctrine, question of the public liberty of thousands of the citizens of Massachusetts; question of the legal existence as property, in Massachusetts, of merchandise valued and taxed by the United States as being of the value of millions of dollars; question of the power of a State, by prohibitory laws of its own, to override, and, in effect, annul the entire commerce power of the United States, foreign and domestic, and the entire tax power of the United States; question of the power of a State to violate and annul, at its will, any or all contracts of purchase and sale; question of the constitutional basis of the internal revenue system of the United States; question of the devolution upon the United States Treasury of reclamation for the reimbursement of immense sums, illegally levied as internal revenue, according to the theory of the legislation of Massachusetts; and question of the

examination and exposition of the provisions of voluminous statutes, Federal and State, and adjudications of the courts of the United States, and of the several States.

As value at stake, it involves ultimately as great value as any case ever before presented to this Court.

As constitutional law, it presents considerations of as wide scope and deep import as any case ever passed upon by this Court.

As to this case, of such proportions and such character, the Court has now definitely ruled, on the 19th instant, that a brief in the cause shall be filed on the 22d instant, and that it shall be argued at bar on the 26th instant, that is to say, with six working days to prepare for oral argument, and three days in which to prepare and print a brief.

As the alternative of which, the cause is to be argued *ex parte* on the 26th, and the Court is to make a decision under such, the worst of all possible, circumstances for the full understanding of the great questions at stake, and for the credit and authority of the decisions of the Court.

Of course, in the three days assigned for preparing and printing this brief, it is physically impossible for counsel to do justice to the merits of the subject, to the interests of their clients, to the honor of themselves, or to the Court.

The brief cannot be a learned, complete, systematic, and instructive discussion of the questions of law involved, such as it has been the custom of counsel, as well as their pride, to commit to the consideration of the Court, and to deposit in its archives as monuments of the juridical science and erudition of this high bar, the national representative, as it were, of the professional eminence of the United States.

All that can be done is to submit heads of argument, hastily stated, with imperfect citation of authorities and development of thought, and to leave such undigested fragments to the indulgence of the Court.

With this prefatory explanation, the following points are submitted as being among those on which the plaintiff in error relies.

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I. In the ruling of the Court, on the motion for a *certiorari*, submitted by plaintiff in error on the 16th instant, the Court decided that, in view of the law as settled in Gelston *vs.* Hoyt, (3 Wheaton, 246,) it is not necessary to have here the judgment of the Supreme Court of Massachusetts, as if the judgment here to be passed upon were the judgment of the Superior Court of Massachusetts.

But it is respectfully submitted that, in Gelston *vs.* Hoyt, although the Court say that the writ of error might be directed "to either court in which the record and judgment on which it is to act may be found," yet the Court also say expressly:

"The judgment to be examined must be that of the highest court of the State having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ." (P. 304.)

But that judgment, to wit, the judgment of the Supreme Court of the State of Massachusetts, is not found in the transcript of record here, but is expressly described as remaining below on the files of the Superior Court, and not sent up to this Court.

II. A license, as that word is used in acts of Congress, is authorization to do the thing licensed, and if the license be within the constitutional power of the licensor, if granted by a person having power to grant, then the license transfers to the licensee or grantee the lawful right and full power to do whatever the license purports to authorize. In other words, in the language of this Court, the license transfers to the licensee all the right, which the grantor can have, to do that which is comprehended in the terms of the license.

Where such a license is granted by the United States, in the exercise of any constitutional powers of the Federal Government, nothing can be added to, or substracted therefrom, by the authority of any one of the States; the Federal

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power in such case is paramount, absolute, comprehensive, exclusive, and conclusive, as against the State.

Gibbons *vs.* Ogden, 9 Wheaton, 567.
Sinot *vs.* Davenport, 22 Howard, 227.
Foster *vs.* Davenport, 22 Howard, 244.
Hays *vs.* Steamship Company, 17 Howard, 599.
The People *vs.* Brooks, 4 Denio, 479.

III. The license relied on in the present case is, in the express terms of the act under which it was granted—viz: the act of July 1, 1862, entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt"—declared to be authorization.

The provision is in the following clause, (sec. 64, xii U. S. Statutes, p. 455,) viz:

"Retail dealers in liquors, including distilled spirits, fermented liquors, and wines of every description, shall pay twenty dollars for such a license. Every person who shall sell or offer for sale such liquors, in less quantities than three gallons at one time to the same purchaser, shall be regarded as a retail dealer in liquor, under the act. But this shall not authorize any spirits, liquors, wines, or malt liquors, to be drunk on the premises."

In expressly enacting that the license shall not authorize any spirits to be drunk on the premises, it also expressly enacts, in effect, that the license does authorize sale for any other purpose than that of being drunk on the premises.

IV. The plaintiff in error was not indicted for, or charged with, selling to be drunk on the premises, but only for doing that very precise thing, which the license expressly authorizes and empowers him to do, viz: keeping for sale and selling intoxicating liquors.

Hence the plaintiff in error is fully protected in what he did by his license; and the attempt of the State of Massachusetts to punish him for doing that which the license expressly empowered him to do, was the plain nullification of an act of Congress, and a flagrant invasion and violation of the paramount authority of the United States.

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V. This license, under the Internal Revenue Act, is not a mere tax, but an authority, sold by the United States, and purchased by the licensee, for a sum of money, in virtue of which the United States contract with the licensee that he shall have power to do the thing licensed; without which, the license, and the money received for it, are an act of imposture, fraud, and robbery by the United States.

VI. Thus far the demonstration seems to be conclusive, unless there be something to be said in derogation or qualification of the proposition advanced.

One thing is adduced to that effect, viz: a provision in the same act of Congress, (sec. 67, xii U. S. Statutes p. 459,) in the following words:

"And be it further enacted, that no license hereinbefore provided for, if granted, shall be construed to authorize the commencement or continuation of any trade, business, occupation, or employment therein mentioned, within any State or Territory of the United States in which it is or shall be specially prohibited by the laws thereof, or in violation of the laws of any State or Territory."

But this provision cannot avail the defendant in error, for the following reasons:

1. According to received rules of statute construction, this clause of section 67 must be held subordinate to the before-cited clause of sec. 64, and, if inconsistent, yields to it.

This point will be argued at length, orally, on the hearing at the bar.

2. According to the same rules of statute construction, in so far as legislative intention can be distinguished from apparent legal effect, if there be any such distinction, then it could not have been the intention of Congress to bestow on the separate States any such eminent prerogative power.

This point will be more fully argued, orally, on the hearing at the bar.

3. Consider what would be the effect, in the eleven States lately in rebellion, of attributing to this clause the supposed prerogative power. In view of their impoverishment by the war, and of hostile emotions remaining among them, would

they not accept the invitation, thus tendered to them, to cut off, by State legislation, all sources of license revenue, intended "to pay interest on the public debt of the United States?"

Note well, that the provision of section 67 does not apply specially to the sale of distilled spirits, fermented liquors and wines, but "to any trade, business, occupation, or employment," mentioned in the act: the terms of which are broad enough to comprehend any conceivable lucrative "trade, business, occupation, or employment."

Note further, that, according to the terms of section 67, in order to cut off all Federal license-revenue, it needs only that such "trade, business, occupation, or employment" "shall be specially *prohibited* by the laws" of such State: it does not need that such prohibitory laws shall be executed by the State.

4. But, if the legal effect and statutory intention of the provision of section 67 be such as the defendant in error maintains, then the provision is null and void, for cause of conflict with the spirit, as well as the letter, of the Constitution.

The Constitution declares that "All duties, imposts, and excises shall be *uniform* throughout the United States." (Article 1, sec. 8.)

Shall Massachusetts, because of peculiar *notions* of public policy of her own, evade and escape her due share of the burthen of Federal taxation, and throw the same on the States of Maine, New York, Pennsylvania, Georgia, Ohio, Illinois, Iowa, and California?

If Massachusetts may do this, cannot the other New England States, which partake more or less of the same peculiar notions, throw off their taxes upon the shoulders of the other States of the Union?

If New England may do this, can it not also be done by all the eleven States late in rebellion against the public authority of the Union?

Nay, if six States, or even one State, may do this, cannot every and all the States do it, so as completely to nullify the tax provisions of the act of Congress, and so exhibit to the

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world the ridiculous and contemptible spectacle of an act of Congress, to raise revenue for the support of Government and payment of the public debt of the United States, containing within itself a provision for its own utter nullification by the people of each and all of the States?

5. Finally, if this provision of section 67 can have any legal effect or intention accorded to it, then, at any rate, it cannot have the effect or intention of recognizing force of any laws of a State, other than such as are in themselves constitutional: it cannot have the legal effect or intention of breathing vitality into any *unconstitutional* laws of a State.

Now, the laws of Massachusetts, *in hac materia*, are unconstitutional *per se*, and independently of their relation to the license question.

This sub-point requires to be discussed by itself, and under appropriate heads of primary points as hereinafter follows.

VII. The laws of Massachusetts, which are set up here to override the license held by the plaintiff in error, are in violation of the *foreign* commerce power of the United States.

Abundant authorities exist to show that the foreign commerce power is complete and exclusive, as illustrated in the following cases:

Smith *vs.* Turner, 7 Howard, 283.
Sinot *vs.* Davenport, 22 Howard, 227.
Foster *vs.* " " 244.
Elkison *vs.* De Liesseline, 2 Whart. C. C., 56.
Brown *vs.* Maryland, 12 Wheat., 419.
Thurlow *vs.* Massachusetts, 5 Howard, 504.

State laws in derogation of the foreign commerce power of the Union are null and void, as adjudged in the foregoing cases.

To be sure, regulation on the part of States has been recognized in some cases, but prohibition never.

Brown *vs.* Maryland, 12 Wheat., 419
Thurlow *vs.* Massachusetts, 5 Howard, 504.
Mayor of N. Y. *vs.* Miln, 11 Peters, 102.
Cooley *vs.* The Wardens, 12 Howard, 299.

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And the laws of Massachusetts *in hac materia* prohibit absolutely.

Cite here and comment upon the liquor laws of Massachusetts.

VIII. The laws of Massachusetts, which are set up here to override the license held by the plaintiff in error, are in violation of the domestic or inter-State commerce.

The inter-State commerce power is not less complete or integral in terms than the foreign commerce power; and whatever qualifications, if any, this Court has ever applied to the inter-State commerce power, are of regulation only, parallel to, or in defect of, action by Congress, but never reached the length of prohibition.

Gibbons *vs.* Ogden, 9 Wheaton, 96.
Brown *vs.* Maryland, 12 " 419.
Thurlow *vs.* Massachusetts, 5 Howard, 504.
Pennsylvania *vs.* Wheeling Bridge, 8 Howard, 421.
Vesey *vs.* Moore, 14 Howard, 568.
Wilson *vs.* Blackbird Creek Company, 2 Peters, 421.
Moore *vs.* American Transportation Company, 24 Howard, 1.
Conway *vs.* Taylor's Extr's, 1 Black, 603.
Works *vs.* Junction R. Road, 5 McLean, 426.
Jolly *vs.* Terre Haute Draw-Bridge Company, 6 McLean, 237.
Corfield *vs.* Coryell, 4 Washington C. C., 478.
Columbus Insurance Company *vs.* Peoria Bridge Company, 6 McLean, 70.
Columbus Insurance Company *vs.* Curtenius, 6 McLean, 209.
United States *vs.* Railroad Bridge Company, 6 McLean, 518.
Gilman *vs.* Philadelphia, 3 Wallace, ——.

But the laws of Massachusetts, instead of regulating, do in express terms prohibit, and are therefore null and void.

Cite here the pertinent provisions of the laws of Massachusetts.

IX. The laws of Massachusetts in *hac materia* are in violation of the tax power of the United States.

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be *uniform* throughout the United States."

It was long ago determined that this power is complete, exclusive, paramount.

McCulloch *vs.* Maryland, 4 Wheaton, 416.
Osborne *vs.* Bank United States, 9 Wheaton, 738.
Weston *vs.* Charleston, 2 Peters, 449.
Loughborough *vs.* Blake, 5 Wheaton, 317.

The time is passed when this doctrine could have been disputed. It has been definitively determined by this Court.

The Bank Tax Case, 2 Wallace, 200.

But the laws of Massachusetts declare to be outlawed, and seize and destroy as such, distilled spirits, fermented liquors, and wines, whether foreign or domestic, subject to the excise laws of the United States as well as its foreign import duties, and so, in effect, extinguish together the taxed article and the tax power of the United States.

Quote and comment upon the pertinent provisions of the laws of Massachusetts.

X. The laws of Massachusetts in *hac materia* violate that provision of the Constitution, which declares that, "no State shall make any law impairing the obligation of contracts."

The laws of Massachusetts deprive the articles of trade herein mentioned of all the qualities of property; which extinguishes the subject-matter of contracts, and the contracts themselves, therewith.

Cite and comment on the provisions of the laws of Massachusetts in this respect.

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See also the following cases:

Foster *vs.* Thurston, 11 Cushing, 322..
Fisher *vs.* McGirr, 1 Gray, 1.
Breck *vs.* Adams, 3 Gray, 569.
Webster *vs.* Munger, 8 Gray, 584.

XI. If the liquor laws of Massachusetts are valid, then the United States has been collecting millions of revenue of the people of Massachusetts in violation of law, and should be held to refund the same, as having taken the same from the citizen without right, and without consideration, under color of an act of Congress, which act of Congress is null and void in the face of the pretended supreme and paramount legislative power of the State of Massachusetts.

XII. The legislation of Massachusetts, as a question of conflict between her legislative power and that of the United States, cannot be maintained here by any tenable theory of the nature of that undefined, mysterious, and mythical creature, the so-called police power of the States.

To discuss this question in oral argument at the bar.

XIII. No aid of construction, to turn the balance of a doubtful question, can be derived from the quality of the laws of Massachusetts *in hac materia*, in the relation of morality, expediency, or the public good.

1. It is not true, as alleged, that wines, fermented liquors, or even distilled spirits, are poisons of themselves, any otherwise than that everything we eat or drink may be deleterious if used in excess.

2. In view of the example and injunctions of our Saviour and his apostles, in this respect, it cannot be true that the use of wine is immoral in itself.

3. It is not true, as pretended, that it is our duty to abstain utterly from any object of health or enjoyment because others may abuse it. The effect of this doctrine would be to deprive us of everything desirable, even the dearest of all human relations; since nothing exists for the use of man which some men will not abuse.

4. It avails nothing to make war on the *sale* of distilled

spirits; for spirits may be distilled in every man's kitchen, by means as cheap, as accessible, and as manageable as the preparation of a cup of tea or coffee; and if it were not so, other anæsthetic agents exist, which the law cannot reach, such as opium and bang, the familiar means of intoxication used by more than half of the human race, to say nothing of the professed anæsthetic medicaments.

5. The universal prevalence of the use of one or another object of this nature, in all ages, all countries, and all states of society, serves to show that they satisfy a physical exigency of man's organization as imperative as that of food, and of course laws cannot eradicate, although they may regulate, such use.

6. If the use, and the sale for the use, be immoral, then Massachusetts, which is officially the largest seller of intoxicating drinks in the State, is the most immoral *person* in the State.

7. The professing, by the State, of sale of distilled spirits and wines to be drunk as medicine, is disingenuous; for it is notorious to all men that, as to most of the professed sale for medicine, the actual sale is for beverage.

8. It revolts the sense of mankind, to undertake to prohibit absolutely by law the use of wines, fermented liquors, and distilled spirits as a healthful beverage in moderation of use; and the effect of such laws, if rigidly enforced, would only be to introduce, by the side of the vice of drunkenness, the worse one of universal hypocrisy and false profession.

9. It confounds all distinction of right and wrong, in the acts of instructed men, and in the conscience of the less instructed, to seek to elevate the use of wine to the dignity of an illegal and immoral thing, for the suppression of which all the energies of society should be tempestuously exerted.

10. The evils of intemperance in the use of intoxicating drinks are deplorable, (as indeed is all intemperance, including that of professed reformers of all the ills of society at a dash,) but these evils are more often *effect* than *cause*; and, so long as they are treated erroneously as universal cause, no true progress can be made in the improvement of society in this respect.

11. All such vehement efforts of reform in a false direction inevitably produce reaction, and a state of things worse than that which existed before the agitation.

12. The so-called temperance agitation has effected no abatement, in the whole, of the use or abuse of intoxicating drinks.

13. Hence, no considerations of public morality, expediency, or policy come in aid of construction of the apparently unconstitutional laws of the State of Massachusetts.

14. If it were otherwise, if the hypothesis of the State of Massachusetts as to the immorality of the sale and use of distilled spirits, fermented liquors, and wines, be well-founded, then we must admit that the United States internal and external revenue system is permeated with immorality, and that the payment of the interest of the debt is secured by flagitious means; namely, the authorization of trades and employments, and of the manufacture, importation, sale, and use of articles of merchandise, which are *contra bonos mores*.

15. And, if that be so, the remedy does not lie with Massachusetts alone, either in the nullification laws enacted by her, or in attempts to repeal anti-nullification acts of Congress, never more needed for the protection of persons and things liable to be injuriously affected by State laws than now, in this transition of the Union from war to peace, and the unsettled Federal condition of so many of the States.

CALEB CUSHING,
NATHANIEL RICHARDSON,
Of Counsel for Plaintiff in Error.

WASHINGTON, *February* 22, *A. D.* 1866.

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Supreme Court of the United States.

No. 161—Dec. Term, 1865.

JOHN McGUIRE

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

No. 161, December Term, 1865.

JOHN McGUIRE, Plaintiff in Error,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

SUPPLEMENTAL

BRIEF FOR PLAINTIFF IN ERROR.

I. Legal uses and force of the word "license."

1. In the common law, the word license is of early, constant, and well-defined use, as applied to the concession of certain rights by the owners of land to a third party.

Brooke's Abridgment, License.

(*a.*) In this relation, the license imparts to the licensee rights, resembling, though not identical with, an easement; as, for example, the right to hunt on another man's estate, to cut wood, to fish, or to enjoy participation in a water-course.

Ample exposition of the point occurs in

Gale & Whatley on Easements, p. 13.

Washburn on Easements, pp. 133, 142, 315, 560.

Angell & Ames on Water-Courses, secs. 168, 173; secs. 235, 329.

(*b.*) Much of the discussion in these authorities relates only to the inquiry when a license by parol is good, and when it must be in writing ; and how much of the remedy is at common law, and how much in equity : all which is immaterial to the present subject.

3 Kent's Comm., 452.

(*c.*) In all these cases, the licensee possesses property of the class denominated incorporeal hereditaments, and constituting property as rightful as the corporeal hereditament.

2 Blackst. Comm., 20.

3 Cruise's Digest, by Greenleaf, 2.

(*d.*) For explanations of the force of the word "license," as defined in the case of Gibbons *vs.* Ogden, and as maintained by the plaintiff in error here, and for judicial explanation thereof, see

Thomas *vs.* Sorrel, Vaughan's Rep., 351.

Wood *vs.* Leadbetter, 13 Meeson & Welsby, 843.

(*e.*) When such a license is coupled with an interest, by reason of the payment of price, the authority conferred is not a mere permission, but it amounts to a grant, which obliges the grantor, and vests legal property in the grantee.

Leggins *vs.* Inge, 7 Bing., 682.

Winter *vs.* Brookwell, ~~8 East, 3, 9.~~ 8. 308

Hewlings *vs.* Shippon, 5 B. & C., 221.

Resick *vs.* Kerr, 14 S. & R., 267.

Le Febre *vs.* Le Febre, 4 S. & R., 241.

Wood *vs.* Manly, 11 Ad. & Ell., 34.

Webb *vs.* Polinoder, Palm., 71.

(*f.*) Numerous authorities to the same effect as the above occur in the decisions of the Supreme Court of Massachusetts.

Bennett & Heard's Massa. Dig., License.

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2. Next to this common law use of the word "license" comes another common law use of it, to signify a right communicated by the political authority.

(*a.*) Of this use of the word we have instructive illustration in one of the earliest forms in which it occurs, that of licenses granted by the king to the king's tenant to perform acts in derogation of the conditions of feudal tenure.
Comyns' Digest—Alienation.
Coke Lyttleton, 43 a.
Brooke's Abridgment—Alienation.

(*b.*) Another ancient form of license, by political authority, is that of alienation in mortmain.
Comyns' Digest—Capacity, B. 2.

(*c.*) Another description of the old common law licenses, some forms of which remain to the present day, is that by which the crown grants to the subject the right to do acts to relieve him, temporarily or permanently, from the discharge of his general obligations to the government; as, for example, license to reside in foreign countries.
Bartue and the Duchess of Suffolk's case, 2 Dyer, 176 b.
Sir Francis Knoles' case, 3 Dyer, 375 b.
The King *vs.* Earl of Nottingham, Lane, 42.

(*d.*) Or to define by statute the place in which, and the conditions under which, acts of ecclesiastical relation may be performed; as, for instance, the solemnization of marriage.
Act of Parliament 4 George IV, c 76.

(*e.*) In all the cases belonging to this class, as well as the foregoing, "license" imports authorization, and if granted for a price, as for instance, the payment of a fine by the king's tenant in capite, the license conveys an irrevocable and complete grant to do and enjoy the thing granted.

3. There is also a long standing use of the word "license"

in affairs of international relation, where, as in all the previous cases, license imports authorization or grant of power.

Chitty's Law of Nations, see ch. 1, 7.
1 Kent's Com., 164.
The Cosmopolite, 4 Ch. Robinson, 8.

4. But the most familiar use of the word license, and that which has the closest analogy with the present subject, consists of licenses enacted by statutes, which statutes provide, in regard to a great variety of matters, for the grant, by public authority, of licenses to do certain things, or pursue particular trades, in consideration of a price paid by the licensee, and on the payment of which, and delivery of the license, the licensee acquires a complete contract property in the thing authorized to be done, or the trade pursued.

(*a.*) This legislation dates back in England as far at least as the period of the Protestant Reformation and the reign of Edward VI. The overthrow of the Catholic Church, and of the moral and religious influence of the regular and secular clergy of that Church, compelled legislators to look around for some other means of preventing the excesses of men. They could think of nothing but penal laws. And from that day to this has been kept up the delusion, with more or less hold on society, that penal laws are capable of counteracting immoral tendencies and producing moral conduct.

It needs only to examine the statutes on this subject collected in Hawkins' Pleas of the Crown, c. 78, and Burns' Justice of the Peace, title Ale Houses, to observe the efforts to substitute in this way penal legislation for moral and religious instruction.

The laws enacted in England, from the time of Edward VI down to that of the Georges, and in the several States of the Union, as exemplified in their worst form by the existing laws of Maine and Massachusetts, seem painfully to demonstrate how wildly, from that day to this, our English and American society has been floundering along from one folly to another in the founderous paths of false theory and unphilosophical legis-

lation, under the influence of that will-of-the-wisp idea that *law* is the all-sufficient remedy of every sort of human infirmity, which idea is itself the special human infirmity of the well-intentioned people of New England.

(*b.*) However this may be, licenses thus came into vogue to cover things of this description. And we find them applied, in England and the United States, to public houses, fairs, shows, theatrical exhibitions, and other objects *ejusdem generis*, which society regards as requiring regulations.

(*c.*) In all these forms of the use of the word "license," it indubitably imports authorization, the power and the right to do the thing licensed, under the guaranty of the granting political authority.

5. Finally, to mention only one other kind of license, we have that which pervades the municipal law of all the States, viz: the license granted by the proper courts of law and equity to make sale of the estates of decedents, of minors, of wards, and of persons *non compotes mentis*.

Much of this licensing is done in virtue of special statute authority, and much of it in virtue of general authority vested in particular courts.

In all such cases, and whether the source of authority be general or special, the license is authorization, and imparts to the licensee power and right to do the thing licensed, according to law.

II. Construction of Statutes.

1. The general scope, intendment, and object of the act of Congress involved in this case, namely, the act of July 1, 1862, entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," are indubitable, not only as indicated by the title of the act, but also by its general tenor and universal contents. To raise revenue by taxation is the one great object of the statute.

2. Now, the clause of this statute, on which the State of Massachusetts relies, constitutes a separate provision, of the class of enactments called "saving clauses;" and if it be allowed to have any effect, and so far forth as it has any, it destroys, nullifies, abrogates, and abolishes whatever there may be of thought, virtue, or use, in the general purview, intendment, and scope of the act of Congress.

3. As to such a clause having such effect the rule of law is positive, that the saving clause must be rejected.

(*a.*) The doctrine is stated in Dwarris as follows:

"A saving clause in a statute, where it is directly repugnant to the purview or body of the act, and cannot stand without rendering the act inconsistent and destructive of itself, is to be rejected. An illustration of this rule is to be found in Alton Wood's case, 1 Rep., 47. Lord Coke puts it thus: J. S. is tenant in fee simple of the manor of Dale, or tenant in tail thereof, the reversion to the king; and afterwards this manor is, by express name, given by act of Parliament to the king, saving the right, title, interest, &c., of all person and persons. Whether the estate of J. S. be saved or no? And it seems not; for the saving as to the owner of the land is repugnant, inasmuch as the manor is by express name given to the king; for if the general saving shall extend to the owner of the land, then the act would be made in vain. In the case in Plowden the supposed attainder of the Duke of Norfolk was, by act of Parliament, (1 Mariæ,) 'declared to be void and null *ab initio*, saving the estates and leases made by Edward VI.' That saving was void; for when the attainder was declared to be void, the said saving was against the body of the act, and therefore void. And the like in other cases, where the saving clause is repugnant to the gift or grant, and if allowed to operate, would render it vain and nugatory."

2 Dwarris on The Statutes, 659, 660.

Plowden, 564.

(*b.*) We have the rule recognized in many authorities; as, for example :

Sedgwick on Statutes, p. 60.
Walsingham's case, 1 Plowden, 365, Note.
Thornby *vs.* Fleetwood, 10 Mod. R., 115, 408.
Keilwey's R., 174, pl. 4.
Milford *vs.* Elliott, 8 Tauntin, 113.
Dugan *vs.* Bridge Company, 27 Penn., 303.

(*c.*)In the quaint phraseology of the old law writers, such a clause is denominated "a flattering one," and is said to be "such as serves to make fools merry," implying that all persons who, like the defendant in error in this case, rely upon such a saving clause in contradiction to the whole purview of the statute, are flattered with false hopes, and if they become merry in the supposition that such a saving clause does them any good, are merry not according to wisdom.

1 Daveis' Reports. Case of the Proxies.
3 Keble, 236.

(*d.*) The distinction between a saving clause and a proviso is this: A proviso is a special provision of reservation attached to some other special provision, which it qualifies, or with respect to which it stands in the relation of a condition.

Dwarris on Statutes, 515.
Sedgwick on Statutes, 62.
Attorney General *vs.* Chelsea Water Works Company, Fitzgibbon, 195.
Rex *vs.* Justices of Middlesex, 2 B. and Adolph., 818.
Wayman *vs.* Southwood, 10 Wheaton, 1.
Voorhees *vs.* Bank of the United States, 10 Peters, 440.

4. In regard to the clause of the act of Congress, relied upon by the State of Massachusetts, nothing is to be inferred from its place in the statute, (sec. 67,) posterior to that under which the plaintiff in error received his license from the United States, (sec. 67.)

It is quite common in the construction of statutes to find a subsequent clause, although apparently general in terms, restrained by a preceding clause of paramount exigency and authority.

Roper *vs.* Ratcliffe, 10 Mod. Reports, 242, 485.

III. Extracts from General Statutes of Massachusetts, ch. 86, to be cited in argument at bar.

SEC. 1. Provision for the appointment, in behalf of the State, of a public officer entitled "commissioner to purchase and sell spirituous and intoxicating liquors of a pure quality."

SEC. 12. Provision for authorizing persons "to manufacture spirituous or intoxicating liquors and to sell the same in quantities not less than twenty gallons, to be exported, or to be used in the arts for mechanical and chemical purposes in the State."

SEC. 17. Provision for the appointment of local agents of the State in the several towns and cities, who receive their supplies from the State commissioner.

SEC. 25. "The importer of liquor of foreign production, imported under the authority of the laws of the United States, may own, possess, keep, and sell the same, in the original casks and packages in which it was imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported."

SEC. 26. "Druggists may sell, for medicinal purposes only, pure alcohol to other druggists, apothecaries, or physicians known to be such."

SEC. 27. "A chemist, artist, or manufacturer, in whose art or trade it may be necessary, may keep at his place of business spirituous liquors for use in such art or trade, but not for sale."

SEC. 27. "Any person may manufacture and sell cider for other purposes than that of a beverage."

SEC. 28. Except under the foregoing conditions "no person shall manufacture for sale or sell * * any spirituous or intoxicating liquors;" which terms include "ale, porter, strong beer, lager beer, cider, and all wines, * * as well as distilled spirits."

SEC. 37. "Whoever brings into this State, or conveys from place to place within the same, any spirituous or intoxicating liquor, with intent to sell the same himself or have it sold by others, shall be punished by fine or imprisonment."

SECS. 42 to 54 provide for searching the premises of all persons and seizing any liquor found therein, and for sale, contrary to the foregoing conditions, forfeiting the same and destroying it, or turning it over to a State agent if suitable for for medicinal, mechanical, or chemical purposes.

SEC. 60. "All intoxicating liquors for sale, and the implements and vessels actually used in selling and keeping the same, contrary to the provisions of this chapter, are declared to be common nuisances."

SEC. 61. "All payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor, or personal property, shall be held to have been received without consideration, and against law, equity, and good conscience. No action of any kind shall be had or maintained in any court for the price of any liquor sold in any other State for the purpose of being brought into this Commonwealth, to be here kept and sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose; and all bills of exchange, promissory notes, and other securities for and evidences of debt whatsoever, given in whole or in part for the price of liquor sold in violation of this chapter, shall be void against all persons holding the same, with notice of such illegal consideration, either direct or implied, by law."

IV. Constitutional requirement, that all duties, imposts, and excises, shall be uniform throughout the United States.

1. The importance of this provision is thus considered by Story:

"The order of the subject would naturally lead us to the inquiry, why direct taxes are required to be governed by the rule of apportionment, and why "duties, imposts, and excises," are required to be uniform throughout the United States? The answer to the former will be given when we come to the further

examination of certain prohibitory and restrictive clauses of the Constitution on the subject of taxation. The answer to the latter may be given in a few words. It was to cut off all undue preference of one State over another, in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises, were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures, of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction of their less favored neighbors. The Constitution throughout all its provisions is an instrument of checks and restraints, as well as of powers. It does not rely on confidence in the General Government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, as far as it is practicable. If this provision as to the uniformity of duties had been omitted, although the power might never have been abused to the injury of the feeble States of the Union, (a presumption which history does not justify us in deeming quite safe or certain,) yet it would of itself have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the western States, might have borne down the agriculture of the South; and a combination of a yet different character, might have struck at the vital interests of manufactures. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarm and suppress discontents." (2 Story's Commentaries on the Constitution, sec. 954.)

2. We suppose that never before in the history of the Government did Congress undertake to enact that any one of the

States might, at pleasure, exempt itself from the purview of a general act of Congress, laying "duties, imposts, and excises," on the whole United States, and so take away from those taxes the uniformity required by the Constitution.

Hence, it cannot be expected that we shall be able to cite any adjudged case to the effect that all such taxes shall be uniform. No legislator imagined it could be otherwise, no law was passed on which the question could be raised, no court or judge could decide or even debate the point.

The converse of this question, to be sure, has been raised politically, but never judicially, so far as regards this Court, in the great political discussion of the right assumed by the State of South Carolina to exempt herself from the purview of certain duties on imports, imposed by act of Congress on the whole United States. That, however, was professedly nullification of an act of Congress; and we do not see how violation of the rule of uniformity, that is, practical nullification, is improved in quality by transferring the venue to Massachusetts.

Nevertheless, occasions have occurred, when this Court could not fail to recognize the sanctity and inviolability of the rule of uniformity, while discussing other relations or incidents of the tax power of the United States.

(*a.*) Thus, in the case of Hilton *vs.* United States, 3 Dallas, 173. Mr. Justice Chase employs the following phrases:

"The great object of the Constitution was to give Congress a power to lay taxes adequate to the exigencies of Government, but they were to observe two rules in imposing them, viz: the rule of uniformity when they laid duties, imposts, and excises, and the rule of apportionment according to the census.

"Duties, imposts, and excises were enumerated after the general term of taxes, only for the purpose of declaring that they were to be laid by the rule of uniformity.

"A general power is given to Congress to lay and collect taxes of every kind and nature, without any restraint except

only on exports, but two rules are prescribed for their government, viz: uniformity and apportionment."

(*b.*) In the same case, Mr. Justice Iredell, delivering the opinion of the Court, says:

"The Congress possess the power of taxing all taxable objects, without limitation, with the particular exception of the duty on exports. There are two restrictions only on the exercise of this authority, namely, uniformity and apportionment."

(*c.*) Mr. Justice Paterson speaks as follows in the same case:

"The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case the object and the sum coincide, the rule and the thing unite, and, of course, there can be no imposition. The truth is, that the articles taxed in one State should be taxed in another; in this way the spirit of jealousy is appeased, and tranquillity preserved; in this way the pressure on industry will be equal in the several States, and the relation between the different subjects of taxation duly preserved. Apportionment is an operation on States, and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to States, and is at once easy, certain, and efficacious."

(*d.*) In the case of Longborough *vs* Blake, (5 Wheaton 319) Chief Justice Marshall speaks as follows:

"The 8th section of the 1st article gives to Congress the power to lay and collect taxes, duties, imposts, and excises, for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are: "but all duties, imposts, and excises, shall be uniform throughout

the United States." It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The district of Columbia, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

(*c.*) The Court perceives that uniformity of duties, imposts, and excises, is treated as a postulate or axiom, a first principle of justice as well as of positive organic constitution.

V. Relation of the Supreme Court to constitutional questions.

1. It is the duty no less than the right of the Supreme Court of the United States to determine the constitutionality or unconstitutionality of any or all enactments of Congress.

Marbury *vs.* Madison, 1 Cranch, 137.
1 Story on Constitution, secs. 373, 391.
3 Story on Constitution, sec. 1570.
1 Kent's Comm., Ed. 1851, 449.
Sedgwick's Statutes, 216.

(*a.*) In exercising this power the Court may, and does, pronounce unconstitutional, and therefore of no legal effect,

a particular clause or section of an act of Congress, leaving the residue of the act to stand in full force.

Thus, in Marbury *vs.* Madison, the Court declared a particular provision of the judiciary act to be null, because in conflict with the Constitution.

So in Hayburn's case, (2 Dallas, 409,) and in The United States, *vs.* Todd, (13 Howard, 52, note,) the Court passed upon particular sections of the invalid pension act, holding them unconstitutional. So it was recently in regard to a single section of the Court of Claims' act.

Gordon *vs.* United States, 2 Wallace, 561.

(*b.*) The same point, not with special reference to the power of the Supreme Court, but as a general doctrine of statute construction, has been determined in many cases of adjudication in the States.

We may take the statement of the doctrine, for convenience's sake in the present case, from the jurisprudence of the State of Massachusetts, where it is laid down thus:

"Where part only of a statute is repugnant to the Constitution, that part only will be adjudged void, unless so connected with other parts, that it cannot be presumed the Legislature would have passed one part without the other.

Fisher *vs.* McGirr, 1 Gray, 1.
Warren *vs.* Charlestown, 2 Gray, 84.
Commonwealth *vs.* Clapp, 5 Gray, 100.
Commonwealth *vs.* Hitching, 5 Gray, 485.

(*c.*) Of course, in the present case, to declare the debated clause of sec. 17 of the internal revenue act unconstitutional and void, will not in any way affect the general provisions of that act, but, on the other hand, corroborate and confirm them by removing out of the way a great obstacle to the efficiency of the act as a provision for the public expenditure and the public debt.

2. This relation of the Supreme Court of the United States to acts of Congress, is analagous to, and substantially the same as, the relation of the supreme court of a State to the legislative acts of that State.

Thus in Massachusetts, as in other States of the Union, the Supreme Court of the State determines the constitutionality or unconstitutionality of acts of the legislature.

King *vs.* Dedham Bank, 15 Mass., 447.
Hardy *vs.* Waltham, 7 Pick., 108.
Austin *vs.* Murray, 16 Pick., 126.
Thacher *vs.* Dartmouth Bridge Company, 18 Pick., 501.
Commonwealth *vs.* Albro, 1 Gray, 1.

3. The duty and the power of the Supreme Court of the United States is not less clear to determine the constitutionality or the unconstitutionality of the laws of the States, whether organic or municipal, whether constitutional or statute, and to declare the incompatibility of the same, either with the Constitution thereof, or with any act of Congress, in virtue of that provision of the Constitution of the United States which declares that "the Constitution and the laws of the United States, which shall be made in the pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land. And the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

See Cohens *vs.* Virginia, 6 Wheaton, 264.

In the exercise of this function the Supreme Court of the United States enters into consideration of the constitutions of States, and of course that of their legislative acts.

Cooper *vs.* Telfair, 4 Dallas, 14.
Fletcher *vs.* Peck, 6 Cranch, 87.
Terret *vs.* Taylor, 9 Cranch, 43.
Webster *vs.* Cooper, 14 Howard, 488

The Court may declare void a single provision of a State law, and leave the rest to stand.

McCulloch *vs.* Maryland, 4 Wheaton, 316.

Or by reason of the general repugnancy of the legislative

act of a State to the Constitution of the United States, this Court may pronounce such act to be unconstitutional and void in its entirety.

Trustees of Dartmouth College *vs.* Woodward, 4 Wheaton, 518.

Society for Propagation of the Gospel *vs.* New Haven, 8 Wheaton, 464.

VI. Relation of the tax power of the United States to that of the several States.

1. We assume, without stopping to argue the question, that, within the sphere of its constitutional functions, the Government of the United States is supreme as respects the several States and the people thereof.

As positive law, that is the express letter of the Constitution of the United States. We know historically that the accomplishment of this object was the main purpose and chief end of the substitution of the Constitution for the Articles of Confederation.

2. As to taxes raised by duties on imports and exports, there is no room for controversy, since duties on exports are forbidden by the Constitution, and the power to impose duties on imports is vested in the United States exclusively. As to internal revenue taxes, we have seen already that the power of the United States to impose such taxes applies to all objects whatever, subject only to the condition, either of uniformity, or of apportionment according to representation.

3. But, in regard to internal taxes as distinguished from duties on imports, the powers of the United States are concurrent so far as regards the subject-matter of taxation—that is to say, each may tax land, income, occupation, and personal property of whatsoever name or nature.

Story on the Constitution, sec. 937.

Thus, the internal revenue act before us provides, as follows: "Nothing in this act shall be held or construed so as to pre-

vent the several States, within the limits thereof, from placing a duty, tax, or license, for State purposes, on any business, matter, or thing, on which a duty, tax, or license is required to be paid by this act."

xii United States Statutes, 559.

4. This concurrency of power, however, is imperfect on the side of the States, and perseveres up only to a certain point; for, as the power and right of the United States are supreme, they may charge the subject-matter with the maximum of taxation possible, and, by the enactment of a lien for the tax, exhaust and consume that subject-matter.

This doctrine is unequivocably affirmed by Kent in the following suggestive and instructive page of the Commentaries:

"When the Constitution of the United States was under the consideration of the State conventions, there was much concern expressed on the subject of the general powers of taxation, over all objects of taxation, vested in the national Government, and it was supposed that it would be in the power of Congress, in its discretion, to destroy in effect the concurrent power of taxation remaining in the States, and to deprive them of the means of supplying their own wants. All the resources of taxation might by degrees become the subjects of Federal monopoly. The States must support themselves by direct taxes, duties, and excises, and Congress may lay the same burden at the same time on the same subject. Suppose the national tax should be as great as the article, whether it be land or distilled spirits, or pleasure carriages, for instance, will conveniently and prosperously bear, and the State should be obliged to lay a further tax for its own necessities: the doctrine, as I understand it, is, that the claim of the United States should be preferred, and must be first satisfied, because the laws of the United States, made in pursuance of the Constitution, are the supreme laws of the land. The author of the Federalist admits that a State might lay a tax on a particular article equal to what it would well bear, but the United States would still have a right to lay a further tax on the same article; and that all collisions, in a struggle between the two governments for revenue, must and would be avoided by a sense of mutual for-

bearance. He nowhere, however, meets and removes the difficulty in the case of a want of this mutual forbearance, where there is a concurrent tax laid on the same subject, and which will not bear both taxes. He says only, that the United States would have no right to abolish the State tax. This is not contended; but would not the United States have a right to declare that their taxes were liens from the time they were enforced? And would they not, as of course, be entitled to be first paid? And must not the State collector, in all cases, stand by and wait until the national tax is collected, before he proceeds to collect his State tax out of the exhausted subject? Upon the doctrine of the Federal courts, and upon the doctrine of the Federalist himself, this must be the case; and, though the State legislatures have a concurrent jurisdiction in the case of taxation, except as to imports, yet in effect, though not in terms, this concurrent power becomes a subordinate and dependent power."

1 Kent, Ed. of 1861, p. 430.

5. The doctrine, thus affirmed by Kent, appears in all those masterly opinions of this Court on the subject of the Constitution, contained in the volumes of Cranch and Wheaton.

Thus, in Sturgis *vs.* Crowningshield, the Court say:

"Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislature as if they had been expressly forbidden to act on it."

Sturgis *vs.* Crowningshield, 4 Wheaton, 122, 193.

The same doctrine pervades the cases of

McCulloch *vs.* State of Maryland, 4 Wheaton, 316.
Gibbons *vs.* Ogden, 9 Wheaton, 1.
Houston *vs.* Moor, 4 Wheaton, 1.
Almy *vs.* California, 24 Howard, 169.
Brown *vs.* State of Maryland, 12 Wheaton, 419.

In the latter case the Court say:

"It has been observed that the powers remaining with the

States may be so exercised as to come in contact with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the General and State Governments as a vital principle of perpetual operation. It results necessarily from the principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national Government within its proper sphere." (P. 448.)

6. Of course, there may be conflict of measures in the exercise of the concurrent power of taxation. If so, the States must yield. But there need be no conflict, if the respective governments act in conformity with the *spirit* as well as the letter of the Constitution. Or, to quote the patriotic language of Chief Justice Marshall, in Gibbons *vs.* Ogden—

"It would be in vain to deny the possibility of a clashing and collision between the measures of the two Governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of—that of a frank and candid cooperation for the general good. * * * Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object and use the same means, and yet the powers be kept perfectly distinct. A resort to the same means therefore is no argument to prove the identity of their respective powers." (P. 238.)

VII. The power of the United States is not the less supreme because of the tax in the present case being associated with a License.

1. We have already seen that, in the very latest case before

the Court, that of Gilman *vs.* Philadelphia, the majority of the Court, as well as the minority, declare that a license granted by the United States carries with it all such right and authority as it is in the power of the United States to confer.

Or, as more specifically stated by the Court in Pennsylvania *vs.* The Wheeling Bridge Company—

"No State law can hinder or obstruct the free use of a license granted under an act of Congress."

13 Howard, 566.

2. The grant of licenses to do a particular act, and the collection of revenue in association with that act, constitute a form of legislation familiar to the use of the people of the United States from the earliest dates, and down to the time of the adoption of the Constitution.

Such a license, granted under the Constitution of the United States, stands on two immovable foundations, viz: first, the commerce power, and secondly, the tax power.

In each of these relations, the laws of the State of Massachusetts, produced here to annul the license as an act of commerce, and the excise upon it as an act of taxation, are destructive to the general effect of the internal revenue act; are subversive of the paramount power of the Union; are more fatal in tendency as against the integrity of the national debt than all projects of direct repudiation; and are in plain and palpable violation of the Constitution of the United States.

If Congress, by this clause saving the effect of laws of the State, intended what the State of Massachusetts here pretends, then Congress was guilty of violation of the Constitution. We should, of course, endeavor to reach a conclusion, which shall not impute any such unconstitutional intention to Congress. We do reach such a conclusion in treating the questionable clause as repugnant to the general purview of the act, and, therefore, as of no effect. And we also reach the

same conclusion by determining that the laws of Massachusetts are unconstitutional and void, because they violate the sanctity of contracts protected by the Constitution of the United States, and because they stand in irreconcilable conflict with the tax power and commerce power of the Federal Government.

C. CUSHING,
N. RICHARDSON,
Of Counsel for Plaintiff in Error.

WASHINGTON, *February* 24, *A. D.* 1866.

Supreme Court of the United States.

No. 161—Dec. Term, 1865.

JOHN McGUIRE

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

SUPPLEMENTAL

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1865.

UNITED STATES *vs.* RUFUS B. VASSAR.—No. 84.

ARGUMENT SUBMITTED BY CHARLES LEVI WOODBURY.

The Constitution grants two classes of powers to the Federal Government, one in which the subject is granted exclusively to the Federal authority, and one where a concurrent power on the subject is granted them.

Where the exclusive power is granted, this Court has held that the States might continue to exercise jurisdiction over those parts of the subject which Congress had not included in their legislation, but that where collision of legislation arose, the State law became void.

In that class of powers where the right granted to the Federal Government is not intended to be exclusive, but simply to be concurrent with a right existing in the States over the same subject, a different rule prevails. *The License Cases*, 5 *Howd.*, brought up this subject, and the efforts of the Justices of this Court appear to have been directed to ascertain whether the States were exercising a power that belonged to them, or one that had been exclusively delegated to the Federal Government. Having determined that the action of the State was founded on a reserved power, the Supreme Court showed great indisposition to countenance the idea that any slight clashing in practice between the two authorities, arising incidentally in the exercise of rights, should be deemed an excuse or cause for trenching on the reserved powers of the States, or for impeaching a legislation not necessarily nugatory of that of Congress.

The power to levy "taxes and excises," granted to the Federal Government, is concurrent with that possessed by the States on the subjects. As an inhabitant of a State is liable to the laws of each sovereignty, made in the several exercise of this concurrent authority thus co-ordinate by the Constitution, in matters of collision of laws, the unfortunate position of the defendant powerlessly subject to two colliding masters, ought to enter into the consideration of the case, and induce the vindication of sovereignty to be accomplished by the appropriate action of the high powers on each other, and whatever view of the abstract powers of the law makers may be held, he ought not to be made the victim in person or purse of a collision of legislation not produced by himself.

Comparing the Acts of 1862–3 with the State law pleaded by the defendant, it does not appear that there is any necessary collision or conflict between them, and while we admit

that an injudicious exercise of the admitted State powers of police, sanitary, revenue, and license systems, might produce conflicts with equally admitted exclusive Federal powers, or *vice versa*, yet we submit that the Federal acts have been so carefully limited in their scope, and the powers of the Federal Government called into action are so cautiously selected that any possible colliding has been averted.

A careful inspection of these acts will show that Congress framed them with the intention of putting in force only its constitutional power to "levy taxes and imposts." The primary object of the law was revenue, and none of the penalties and forfeitures denounced therein concern any acts except such as tend to the diminution of the revenue sought to be collected. Under the exclusive power to regulate commerce between the States, Congress might well have made general regulations of commerce, and concerned itself in moral and sanitary questions of *mala prohibita*, or *mala in se*, or in the policy of prohibitory and of regulating legislation. What results might have followed, we are spared the contemplation of, as all the offences denounced in the statute trace direct origin in this concurrent power to levy taxes and excises, and are exclusively against acts of individuals tending to diminish revenue. Prohibitory laws of States diminish revenue much more than the sporadic acts of individuals; but no penalty is denounced against them. On the contrary, Congress, with dignified courtesy declare, § 67, that they have no intention to interfere with such prohibitions, and direct that no license, if granted, shall be so construed.

Whatever Congress could have done had it desired, it is clear that the law it made if limited by the restriction to the narrow constitutional field here claimed, involves no discussion of constitutional conflicts between Federal and State authority.

Nor in this view do any incidental collisions arise, Congress acting in the wise policy of conciliating for the new law State prejudices and State pride, deferred the broad question of deciding between prohibition and regulation, yielded its questionable right to draw revenue in a State from the subjects of trade whose exercise was prohibited in that State, and left its license system, § 67, to operate only upon what the State permitted.

This yielding was for harmony sake, and in legal force is equivalent to a grant or quit-claim, or cession by the Federal authority to the States, while this Act shall continue in force of the right to prohibit and to regulate on the subject matter of the Act, and though it may have cost some revenue, yet the gain in harmony of system was, in their judgment, far more valuable.

The § 67 is really a dealing with each State authority, concerning the whole territory of the State, and to that extent, really adopts, recognizes, and gives force to its laws, as part of the Federal law; it is an unusual mode of legislation, but its intent is none the less the rule for the construction of the statute, and the major purpose must control and interpret the object of the minor details.

The modification by a State of a prohibitory law, so as to bring the subject within the scope of regulation, would act practically as an amendment to this statute, so as instantly to

put its license system in force on the thing, in the place or territory previously exempted by force of the prohibitory law from yielding a revenue.

It is contended that it was not the intention of Congress to authorize the issuing of Federal licenses to carry on in a prohibited place a prohibited traffic, because this would be in conflict with the harmonious arrangement contemplated by the statute, and because the §67 says such license, if granted, shall not authorize the commencement or continuation of such trade.

These words of the § 67 are general and inclusive; such license, if granted, by the United States does not authorize under the laws of the United States, and show that the license is void *per se*, and that its issue is an improvident act, unauthorized by law. The prohibitions of § 57 and of § 67 go together. He is not authorized as against Federal or State powers to carry on a prohibited business by means of a U. S. license. The words "if granted," § 67, are used *dubitanter*, and mean if improvidently granted for this prohibited place or thing, and show Congress thought that a license lawfully granted gave some power to an individual.

The harmony intended by the law pervades even this section; the Federal and State authorities accord in prohibiting him.

This brings us to consider the penal clause under which Vassar is indicted, Act 1863, § 24, for knowingly exercising a trade at Albany, for the carrying on of which a license is required without taking out such license, as is in that behalf required. I have endeavored to show that no license was required for exercising this trade at Albany; on the contrary, it was forbidden there by Federal and State laws, and the license, if granted, was declared by § 67 neither to authorize its commencement or continuance. If this is so, the indictment fails.

But it is contended that the Federal Government ought to execute these penal laws over this ground *prohibited* for revenue purposes, in order to act on stray individuals who are wickedly infringing on State laws. This would make the Federal authority act as policemen and detectives to punish, at Federal expense, violators of State prohibitions.

Congress surely did not mean to give up revenue in favor of State prohibitory systems and also to spend its own revenues, and add cumulative penalties to render this loss of revenue by prohibition more certain and absolute than otherwise it would be. This would be self stultification for them. The penal laws are not intended as objects of revenue *per se*, but are to enforce revenue laws. Congress very wisely has not enacted any penalty for violating a State prohibitory law. The expense of enforcing their prohibitions is left to the States themselves. The object of the § 24 is to enforce licenses being taken in places where the trade is authorized, and the case of Vassar clearly is not within the intention of the statute. The root of the evil is State prohibition. Vassar would cheerfully have bought a Federal license, if § 67 had not declared it should *not* protect his business.

All of which is respectfully submitted.

CHAS. LEVI WOODBURY

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Supreme Court of the United States.

JOHN McGUIRE IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR DEFENDANT.

The State Court of Massachusetts ruled that a license to carry on the business or occupation of wholesale dealer in liquors, granted to the Ptf. in error, under the act of Congress to provide internal revenue, gave him no authority to sell intoxicating liquors in violation of the laws of Massachusetts.

The claim on the part of the Ptf. in error, is that this license was a justification to him, and that the statute of Massachusetts, upon which he was indicted, tried and convicted, is void and of no effect.

The act of Massachusetts is as follows:

Section 6. All buildings, places, or tenements, resorted to for prostitution, lewdness or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, shall be deemed common nuisances.

Section 7. Whoever keeps or maintains such common nuisance shall be punished by fine not exceeding one thousand dollars, or imprisonment in the common jail not exceeding one year.

General Statutes, ch. 87.

The indictment charges that Ptf. in error, from the first of January, 1862, to the finding of the indictment, which was in May, 1863, kept

and maintained a tenement used for the illegal sale and illegal keeping of intoxicating liquors to the great injury and common nuisance, &c.

The record shows that it was proved and admitted by Ptf. in error, upon the trial, that he kept and maintained a tenement used for such a keeping and sale of intoxicating liquors, as was in violation of the statute of Massachusetts above cited.

Gen. Stats. ch. 86 §§ 17, 25, 26, 27, 28 and 29,

the material portions of which are as follows, show what keeping and sales are authorized, and what are declared illegal in that State:

Section 17. The Mayor and Aldermen or Selectmen of every city and town, on the first Monday of May annually, or as soon after as convenient, shall appoint for one year, unless sooner removed by the board appointing them, one or more suitable persons as agents of such place to purchase and sell at some convenient places therein, spiritous or intoxicating liquors to be used in the arts, or for medicinal, chemical and mechanical purposes, and no other.

Sect. 25. The importer of liquor of foreign production imported under authority of the laws of the United States, may own, possess, keep or sell, the same in the original casks or packages in which it was imported, and in quantities not less than the quantities in which the laws of the United States require such liquor to be imported, and if sold by him, the same shall be pure and unadulterated as when imported.

Sect. 26. Druggists may sell for medicinal purposes only, pure alcohol, to other druggists, apothecaries and physicians, known to be such.

Sect. 27. A chemist, artist, or manufacturer, in whose art or trade they may be necessary, may keep at his place of business spiritous liquors for use in such art or trade, but not for sale; and any person may manufacture or sell cider for other purposes than that of a beverage, and unadulterated wine for sacramental purposes.

Sect. 28. No person shall manufacture for sale, or sell by himself, his clerk, servant or agent, directly or indirectly, any spiritous or intoxicating liquor, or any mixed liquor, a part of which is spiritous or intoxicating, unless he is authorized as provided in this chapter.

Sect. 29. No person shall own, possess or keep, any spiritous or intoxicating liquor with intent to sell the same in this State, * * * unless authorized as provided in this chapter.

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Sect. 29. No person shall own, possess or keep, any spiritous or intoxicating liquor with intent to sell the same in this State, * * * unless authorized as provided in this chapter.

So it seems to have been proved and admitted that the place kept and maintained by Ptf. in error, was used for such sales of intoxicating liquor as are not authorized by either of these provisions.

The question, therefore, to be now discussed, is whether the license which assistant assessors may lawfully issue under chap. 119 of the acts of the Second Session of the 37th Congress, will authorize a person in Massachusetts to make such sales, or to keep a place used for making such sales, in violation of the statutes of that Commonwealth.

Section 57 of the above act of Congress provides "that from and after the first day of August, eighteen hundred and sixty-two, no person, association of persons, or corporation, shall be engaged in, prosecute or carry on, either of the trades or occupations mentioned in section sixty-four of this act, until he or they shall have obtained a license in the manner hereinafter provided.

Section 58 prescribes the manner of making application for a license. Section 59 fixes the penalty for carrying on business without license. Section 60 provides somewhat as to the form of the license. Sections 61, 62 and 63 are not material to the discussion.

Section 64 clause 3 provides that wholesale dealers in liquors of any and every description shall pay one hundred dollars for each license; and it also defines a wholesale dealer to be a person, not a distiller or brewer, who sells liquor in quantities of more than three gallons at one time to the same purchaser; thus including in the term wholesale dealer almost every person keeping liquor for sale.

Section 67 is as follows; "No license herein before provided for, if granted, shall be construed to authorize the commencement or continuation of any trade, business, occupation or employment therein mentioned, within any State or Territory of the United States in which it is or shall be specially prohibited by the laws thereof, or in violation of

the laws of any State or Territory: *Provided* nothing in this act shall be held or construed so as to prevent the several States within the limits thereof, from placing a duty, tax or license, for State purposes, on any business matter or thing on which a duty, tax or license is required to be paid by this act."

We have already seen that the occupation and business of the Ptf. in Error was proved and admitted to be in violation of the laws of Massachusetts.

The Commonwealth contends, *First*, that the Congress has not undertaken to authorize the sale of liquor in Massachusetts in violation of her Statutes; and *Second*, that even if the Congress had, by positive enactment, authorized such sale in violation of the State laws, such enactment would have been unconstitutional and void.

First. Congress has not undertaken by the act in question to authorize in any State the pursuit of any business or occupation which is prohibited by the Statutes of such State.

This seems to be sufficiently apparent upon the face of the act itself. Section 67, above cited, says as plainly as the capabilities of our language will permit, that Congress had no such intention. It would appear to be quite obvious that the intention was to require all persons doing any kind of business authorized or ~~not~~ prohibited by the statutes of uny State to procure a license from the United States and to pay a tax in the shape of a license fee to the United States. It was uot the intention to declare any kind of occupation to be lawful, or to authorize any person to engage in any class of business; but to require of persons who were found to be engaged in the kinds of business enumerated, the payment of a tax, and the procuring of a license, which latter is a mere incident of the tax and a method of its collection and enforcement.

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The effect of the statute in question is to make any of the enumerated occupations carried on without a license, a violation of the statute; if the occupation was carried on in violation of the State law before this statute, it could not afterwards be continued without violating the law of the State and also this statute of the United States. It is as if the statute had said, "the United States gives you no authority to violate the laws of your State, but if you do, the United States will not interfere, provided you procure a license by payment of the prescribed fee or tax; but if you do not do this, beside leaving you liable to the penalty prescribed by the State laws, you shall also be liable to the penalty affixed to a violation of this statute of the United States. The only effect of the license given you is to prevent your prosecution by the United States under this statute."

This construction for which we contend, gives effect to every word of the act of Congress. Nothing is stricken from it, nothing is explained away. The license is not inoperative. By payment of the fee or excise or tax for which he received it, he acquired the right of selling as an importer, imported liquors, and of selling such other liquors and in such manner as the Massachusetts statute does not prohibit. Except for the license he would be liable under the act of Congress for all these sales. This construction is obviously in accordance with the intention of Congress.

See Congressional Debates, Senate, May 27, 28, 1862.

This construction also is the only one which will cause no conflict of jurisdiction between the State and Federal Governments.

It is supposed that the claim of the Ptf. in error will be, that section 67, before cited, of the act of Congress in question, is so inconsistent with and repugnant to the other provisions of said act as to be void and of no effect.

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It has been attempted to show that there is no inconsistency between the different sections of this act. It is quite certain that there is no such inconsistency as will compel this Court to declare the sixty-seventh section null and void.

There is not only no such repugnancy as is claimed, but we contend that even if section sixty-seven were stricken out, or had never been inserted, this Court would have given the same construction to a license which that section gives, and would have held that the States still had the power to tax and to regulate any "business, matter or thing," to the same extent that this section provides.

This point will be discussed, in another connection, in the course of the argument.

Dwarris says, quoting from Judge Story, "When words conflict with each other, when the different clauses of an act bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one where the absurdity and injustice of applying the provisions to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application."

Dwarris on Stat. 589.

The case in question is not one where under the first sentence of this remark, construction even is called for; much less is it a case of such manifest repugnancy as to call upon this Court to declare any portion of the statute of no effect.

It is the common case, many instances of which may be recollected by all of us, where there is a general intention and a particular intention; and the universal rule in such cases is, that the particular intention is to be considered in the nature of an exception and is to prevail.

Dwarris 514.

Section 67 is an interpretation clause, defining the meaning of the term license as used in the act, and prescribing the effect of the license in all cases The license gives no person authority to violate State laws. And if any man is violating them and insists on continuing to do so, he cannot come here claiming protection under his license upon equitable grounds, because he knew beforehand that by the terms of the law defining his power under his license, no authority was given him to do the acts charged.

The whole of Section 67 must stand or fall ~~alone~~ together; both the clause as to the effect of a license and the clause as to the right of the State to tax. The principle applicable to each is the same. The license is merely a means of collecting a tax. The right to tax implies the right so to tax as to destroy.

McCulloch vs. Maryland. 4 Wheat. 431.

That licenses given under this act of Congress are merely methods of taxation, and that the tax is the gist of the thing, is apparent from the fact that the Federal Government possesses no naked power under the Constitution to license or authorize any business or occupationn in any State. For the purpose of enabling it to carry on the government and as incidental to other powers, it has the right, if at all. In this case it is incidental to the power to tax. Now it cannot be contended that because this method has been taken, probably because the most practicable, of assessing an excise upon particular occupations, that it has any

other or different effect from that which would have followed if no license had been issued, and the act had merely provided that such dealers should pay an annual specific tax to the government. The incidents of a power cannot be greater than the power itself. Whether a tax be levied directly or indirectly, whether one method of its assessment and collection or another be adopted, it is still only a tax, and only the consequences resulting from the payment of a tax can flow from it. And so our claim is that the two clauses of Section 67 stand or fall together; they depend on the same power, and are governed by the same principle.

Now if the Court here shall hold that this section merely expresses what would have been the effect of the act, even if the section had not been inserted, of course it cannot be stricken out, because it is not repugnant to the other provisions. Therefore if it be stricken out, the Court must hold that licenses issued under the act do authorize the violation of State laws, and also that no State may lawfully tax or regulate any "business matter or thing on which a duty, tax or license is required to be paid by this act."

The plain and natural consequences which would result from such a decision conclusively show that Congress did not intend by this act to authorize the violation of the State laws.

The older and later legislation of the United States upon the same subject has a bearing upon the intention of Congress.

Thus section 3 of chap. 38 of acts of 1813, which was an act laying duties on licenses to retailers of wines, &c., it is provided that "no license shall be granted to any person to sell wines, &c., who is prohibited to sell the same by any State."

Section 78 of ch. 173 Acts of 1864, is as follows:

"No license herein before provided for shall, if granted, be held or construed to exempt any person carrying on the trade, business or profession specified in

said license, from any penalty or punishment provided by the laws of any State, for carrying on such trade, business, or profession within such State, or in any manner to authorize the commencement or continuance of such trade, business, or profession, contrary to the laws of such State, or in places prohibited by municipal law; nor shall any such license be held or construed to prevent or prohibit any State from placing a duty or tax, for State or other purposes, on any trade, business, or profession for which a license is required by this act; nor shall any person, carrying on any trade, business, or profession for which a license is required by this act, be exempted from procuring such license, or from any penalty or punishment herein provided, by or in consequence of any State law, either authorizing or prohibiting such trade, business, or profession."

Second. The Commonwealth further contends that there was no error in the State Court; because, if by the Act of Congress in question, authority is given to persons resident in Massachusetts to sell liquors in that State, in violation of the Statutes, heretofore cited, of the State, the said Act of Congress, to that extent, is unconstitutional and void.

The title of the Act in question is "An Act to provide Internal Revenue to support the Government and to pay Interest on the Public Debt." It is a tax act, the authority to pass which is derived from the constitutional provisions giving Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

This act being made in virtue of, and in exercise of the taxing power; there being no provision of the constitution expressly giving authority to Congress to license any business or occupation within the several States; and the licenses granted under this act being, as we have seen, merely the methods and instrumentalities of taxation, and having no effect which the payment of a specific annual tax upon an occupation would not have; it remains to be seen if under the above constitutional provision, Congress has the power, either directly or indi-

rectly, to authorize the residents of any State to exercise in that State any particular occupation or calling. Of course, if Congress does possess this power, it is immaterial whether the particular calling may be allowed or prohibited by the State laws.

The claim of Massachusetts is, that Congress possesses no such power.

Such power has never been claimed for the Federal Government by any Court or by any writer upon constitutional law, nor does a thorough examination of the legislation of the Federal Government show that any such power has ever been exercised. But, on the contrary, it has heretofore uniformly acknowledged, that, while Congress has the power to tax, in one way or another, all property existing and all occupations carried on in the United States, the several States have, with certain limitations, a concurrent power to tax the property and business in the several States ; and have the sole power of regulating their own internal affairs, by prescribing what callings may be pursued, and upon what terms, without the interference of the National Government.

"The power of imposing taxes on all articles, other than exports and imports, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power exclusive in the Union. There is no independent clause or section which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission, that if it were not inserted, the States would possess the power it excludes, and it implies a further admission that as to all other taxes the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous ; it would be unnecessary because if the grant to the Union of the power

of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a negative pregnant; that is a negative of one thing and an affirmance of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles."—*Federalist, No.* 32.

"I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrolable authority to raise their own revenue for the supply of their own wants. And making this concession, I affirm that, with the sole exception of duties on imports and exports, they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the National Government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its constitution."—*Federalist, No.* 32.

In the same number, it is said, "as to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported, in that sense which would work an exclusion of the States."

In number 33, this language is used: "Though a law therefore laying a tax for the use of the United States would be supreme in its

nature, and could not be legally opposed or controlled; yet a law abrogating or preventing the collection of a tax laid by the authority of a State, (unless upon imports and exports,) would not be the supreme law of the land, but an usurpation of power not granted by the Constitution."

I refer, for a general discussion of this subject, to

Federalist Nos. 31 to 36.

This Court has from time to time, as occasion required, spoken upon this subject in no doubtful manner.

"That the power of taxation is one of vital importance, that it is retained by the State, that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied."

McCulloch vs. Maryland, 4 Wheat. 425.

On pages 429 and 430 of same case, it is said, "All subjects over which the sovereign power of a State extends, are objects of taxation. * * * This proposition may almost be pronounced self-evident. The sovereignty of a State extends to everything which exists by its authority or is introduced by its permission." "If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources," &c.

Many quotations from the opinions of this Court, and of the Courts of the different States might be made, all recognizing and affirming the right of the States to tax concurrently with the Federal Government all

property and business within the State which are not properly denominated the means of the General Government.

Gibbon vs. Ogden, 9 Wheat., 198, &c.
Brown vs. Maryland, 12 Wheat., 448.
Weston vs. Charlestown, 2 Peters, 467.
Providence Bank vs. Billings, 4 Peters, 562.
Nathan vs. Louisiana, 8 Howard, 83, &c.

It would seem that, if it be absolutely settled that, although the Federal Government taxes an article of property or an occupation, the right to tax the same thing still remains in the State where such property exists, or where such occupation is exercised, no farther argument would be necessary in this cause. For it has been shown that the license is a method of taxation merely, is granted in exercise of the taxing power, and is after all but a form of receipt for a tax, and gives no rights which the payment of a specific tax upon the occupation would not give; and it being true, as the passage quoted from Chief Justice Marshall shows, that the power of a State to tax, carries with it the power to destroy, it would seem inevitably to follow that if the State may tax the occupation of the Ptf. in error, notwithstanding his license, it may also regulate such occupation, prohibit it and destroy it directly by express legislation, as well as by the indirect mode of taxing it to its destruction.

But it is equally well settled, by authority, that a State may regulate and restrain the internal traffic of its citizens,—may decide for itself what occupations may be exercised, and upon what terms, within its own limits,—and is its own exclusive judge of what shall be done for the protection and elevation of the morals of its citizens; except in so far as a State is expressly prohibited by the constitution. At the time of the establishment of the Federal Government, the States were independent sovereignties, possessing all these powers, and, unless they have surrendered them, they are still retained.

Madison, in the Federalist, No. 45, says, "the powers delegated by the proposed constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State?"

This Court says in the case,

New York vs. Miln, 11 Peters 102,

"We plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered, or restrained by the constitution of the United States. That by virtue of this it is not only the right but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to this end; when the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive. * * * * We should say that every law comes within this description which concerned the welfare of the whole people of a State, or any individual within it, whether it related to their rights, or their duties, whether it respected them as men or as citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property, of the whole people of the State

or of any individual within it; and whose operation was within the territorial limits of the State and upon the persons and things within its jurisdiction."

Mr. Justice Grier says, in giving the opinion of this Court in the case Moor vs. Illinois, 14 Howard 18,

"The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens and of the public peace, has never been surrendered by the States, or restrained by the constitution of the United States."

In giving the opinion of the Court in Conway vs. Taylor, 1 Black 633, after quoting from the language of Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheat. 1, when he says, "They (State inspection laws) form a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State, &c., are parts of this mass" Mr. Justice Swayne says, "The proposition thus laid down has not since been questioned in any adjudicated case."

In fact it would be easy to quote from almost every Judge of this Court, living and dead, and from every eminent statesman of the country since the formation of the constitution, from all sections and from every political party, language to sustain the general proposition, that the power of regulating their internal polity belonged exclusively to the States; that the constitution found the States sovereign and possessing this power of sovereignty, and that it has never been surrendered.

Sturgis vs. Crowninshield, 4 Wheat., 199.
Veazie vs. Moor, 14 Howard, 568.
Cohens vs. Virginia, 6 Wheat., 264.
Bank of Commerce vs. New York, 2 Black, 623.
Passenger Cases vs. 7 Howard, 480.

The License Cases, 5 Howard, 513, not only reiterate this doctrine with great force and ability, but also settle that this particular kind of legislation. relating to the sale of intoxicating liquor, comes within the phrase, municipal regulations.

TANEY, C. J., said, page (577,):—

"But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals, although such law may discourage importation, or diminish the profits of the importer or lessen the revenue of the General Government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, *I see nothing in the Constitution of the United States to prevent it from regulating or restraining the traffic, or from prohibiting it altogether, if it thinks proper.*"

MCLEAN, J., says, page (592):—

"And if the foreign article be injurious to the health or morals of the community, a State may in the exercise of that great and conservative police power, which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

"When in the appropriate exercise of these Federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health or safety of the community, it must be maintained."

CATRON, J., said, (page 611):—

"It follows from the principles stated that the spiritous liquors sold by the defendant, stood on no higher ground than domestic spirits did; and that domestic spirits are subject to the State authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the 25th section of the judiciary act.

"I admit as inevitable that if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that, if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined."

DANIEL, J., said, (page 616):—

"It has been urged that the importer pays a duty to the government for permission to introduce and vend his merchandise: that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may in the first place be replied, as has been remarked in the argument at the bar, that the question is one of constitutional power: and if the Federal Government shall have transcended its legitimate powers, I ask can it be right in any view, to compensate those who may have suffered by the transgression,

by authorizing unlimited reprisals upon the States. But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him, by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities; *but he has not purchased and cannot purchase from the government that which it could not insure to him, a sale independently of the law and polity of the States.* He has, under the legitimate power of the Federal Government to regulate foreign commerce, purchased the right to import or introduce his merchandise: the right to come in with it in quest of a market, but nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society, form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise *and not any supposed right in the Federal Government, in contravention of all these, to enforce such sale.*"

WOODBURY J., said, (page 627):—

"If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a State as being dangerous to public health and morals, or were virtual taxes on them as State property in a fair ratio with other taxation, it does not seem to me that their conflict with the Constitution would, by any means, be clear. Taking for granted till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons, except where within the limits of State territory, they would appear entirely defensible as a matter of right, though prohibiting sales."

GRIER, J., said, (page 631);—

"*I take this occasion, however, to remark that the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have the right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime.* I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

"It has been frequently decided by this court, that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States or restrained by the Constitution of the United States: and that, consequently, in relation to these, the authority of a State is complete, unqualified and conclusive. Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category."

The very question at issue in this cause has lately been decide by the Supreme Court of Massachusetts.

Com'th. vs. Thorniley, 6 Allen 445.

It is submitted, that it inevitably follows from the two propositions which are sustained on principle and authority, to wit—that the States, (with the exception of imports and exports) have unlimited power of

taxing, which includes the power of destroying the property and business of its citizens, notwithstanding the exercise by the United States of its taxing power, and that the States have the exclusive power of regulating their internal polity,—that the Federal Government have not the constitutional authority to legalize within any State any occupation declared unlawful by the Statutes of that State.

If this be not so, if the General Government does possess the power claimed for it by the Ptf. in error, what is there left for State legislation, what is there left of the State governments? If sales of liquor may be authorized, sales of other personal property may be forbidden; if sales of personal property may be regulated, transfers of real estate may also be controlled. If the sale of liquor may be declared no crime, the keeping of houses of prostitution may likewise be made legal; and if these things may be done, there is no statute, whether civil or criminal, of any State which may not be abrogated by the National Government.

Nay, if from a mere exercise of the taxing power this consequence which is claimed by the Ptf. in error really flows, the Statutes of the States are already to a great extent repealed, the mischief is already accomplished without the knowledge of the people. If the taxing of an occupation legalizes it, the taxing of income derived from it legalizes it, and the State has no business to interfere. Why should not the brothel keeper, indicted for the prosecution of his nefarious calling, come into Court and show his receipt for his tax upon the income of his business, as his defense. If the thief indicted for larceny, comes and shows that he has faithfully accounted with the United States for the income from his profession, why should not he escape?

It was certainly the most fortunate circumstance that the framers of this internal revenue law did not lay a specific tax on slaves; if they

had, slavery would have been established in every State of the Union; or I should rather say re-established, for by the tax act of 1813, ch. 16, §5, a tax was levied on slaves, and by virtue of that act, and without the knowledge of the people, slavery was thereby made legal in every section of the country.

But all this is impossible. The State governments and National have not been for three-quarters of a century administered upon any such mistaken view of their several powers. The States are sovereign in their own affairs; the fathers, and framers, and expounders of the constitution have not been guilty of such gross blunders, the eminent judges, the able statesmen of the living and the dead who have directed us and governed us for so many years, have not shown such ignorance of the first principles of constitutional law, as the theory of the Ptf. in error attributes to them.

Charles J. Reed
Atty Genl
of Massachusetts

John McGuire, in error,

vs.

Commonwealth of

Massachusetts.

Brief for the defendant

in error.